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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 JAMES J. HENDRIX,

14 Defendant.

CASE NO. CR19-0024JLR

ORDER GRANTING IN PART
AND DENYING IN PART
MOTION TO DISMISS OR FOR
SANCTIONS

15 **I. INTRODUCTION**

16 Before the court is Defendant James J. Hendrix's motion to dismiss counts 5, 6,
17 and 7 and, in the alternative, to exclude evidence and provide a jury instruction for failure
18 to preserve evidence. (Mot. (Dkt. # 88).) The Government filed an opposition (Resp.
19 (Dkt. # 111)), and the court heard argument from the parties (*see* Dkt. # 120). Mr.
20 Hendrix also provided supplemental materials in support of his motion after oral
21 argument. (Supp. (Dkt. ## 122-123).) The court has considered the parties' submissions,
22 the argument of the parties, the relevant portions of the record, and the applicable law.

1 Being fully advised, the court GRANTS in part and DENIES in part Mr. Hendrix's
2 motion.

3 II. BACKGROUND

4 On August 24, 2018, an officer from the Snohomish County Sheriff's Office
5 ("SCSO") attempted to pull Mr. Hendrix over for driving a motorcycle without a helmet.
6 (Mot. at 4-5.) When the officer attempted to stop Mr. Hendrix, however, he fled the
7 scene on his motorcycle at a high rate of speed. (*See id.*) Moments later, Mr. Hendrix
8 wrecked his motorcycle and was so seriously injured that he was unresponsive at the
9 scene of the wreck. (*See id.* at 5.)

10 Neither the emergency personnel nor the SCSO officers on the scene knew Mr.
11 Hendrix, so the SCSO searched his person for identification. (*See id.*; Resp., Ex. 2 at 2.)
12 One of the officers on scene, Sergeant Sorenson, claims that he found no wallet or
13 identification in Mr. Hendrix's pants pocket, but that he did find a "fanny pack" attached
14 to Mr. Hendrix's waist.¹ (*See* Mot. at 5; Resp., Ex. 2 at 2.) Sergeant Sorenson further
15 claims that he removed the fanny pack and searched it for identification. (*See* Mot. at 5;
16 Resp., Ex. 2 at 2.) Inside the fanny pack, Sergeant Sorenson found plastic baggies of
17 methamphetamine and heroin and two fully loaded gun magazines. (*See* Mot. at 5-6;
18 Resp., Ex. 2 at at 2.) Sergeant Sorenson allegedly alerted the paramedics on scene about
19 the possibility that Mr. Hendrix might have a firearm on his person and searched Mr.
20 Hendrix's person for a gun but did not find one. (*See* Mot. at 5-6; Resp., Ex. 2 at 2.) He

21
22 ¹ The court adopts the term "fanny pack" to maintain consistency with the parties and
their arguments.

1 then searched the fanny pack for a gun and located one inside. (*See* Mot. at 5-6; Resp.,
2 Ex. 2 at 2.) Sergeant Sorenson then handed the fanny pack to a second officer on the
3 scene, Deputy Dermott. (*See* Mot. at 5-6; Resp., Ex. 2 at 2; *id.*, Ex. 3 at 2-3.) Deputy
4 Dermott also searched the fanny pack for identification but did not find any. (*See* Mot. at
5 5-6; Resp., Ex. 3 at 2-3.) Like Sergeant Sorenson, Deputy Dermott saw narcotics inside
6 the fanny pack. (*See* Mot. at 5-6; Resp., Ex. 3 at 2-3.)

7 Mr. Hendrix was transported to Harborview Medical Center due to the severity of
8 his injuries. (*See* Resp. at 3.) While Mr. Hendrix was at Harborview, a traffic
9 reconstruction expert with the SCSO took photographs of the scene to reconstruct the
10 accident. (*See id.*; *id.*, Ex. 9.) According to the Government, this officer was not a
11 narcotics or violent crime detective; his job was to respond to traffic accidents in order to
12 reconstruct the scene of the accident. (*See id.* at 3.)

13 While the traffic reconstruction detective was on the scene, Deputy Dermott took
14 custody of the fanny pack and other personal items from the scene that did not
15 accompany Mr. Hendrix to the hospital. (*See id.* at 3; *id.*, Ex. 3 at 2-4.) At the precinct,
16 he searched and inventoried the items inside the fanny pack. (*See id.* at 3; *id.*, Ex. 3 at
17 3-4.) Inside the fanny pack, Deputy Dermott identified three baggies of narcotics that
18 contained methamphetamine and heroin, a Glock handgun, three loaded magazines, and
19 eight empty clear plastic baggies. (*See id.*, Ex. 3 at 3-4.) Deputy Dermott entered the
20 narcotics, handgun, and magazines into evidence. (*See id.*, Ex. 7.) The Government
21 claims that Deputy Dermott entered “the remaining items” into safekeeping under the
22 label “Household Goods: Items/Property from Injured Motorcycle Rider.” (*See id.* at 3;

1 *id.*, Ex. 7.) The evidence receipt and the Government’s briefing fail to specifically state
2 that the fanny pack was included amongst “the remaining items” that were entered into
3 safekeeping. (*See id.* at 3; *id.*, Ex. 7.) It is also not clear what happened to the eight clear
4 plastic baggies that Deputy Dermott found inside the fanny pack. (*See id.* at 3; *id.*, Ex.
5 7.)

6 On August 27, 2018, the SCSO sent a letter to Mr. Hendrix advising him that his
7 personal property was available for pickup and would be destroyed within 60 days
8 pursuant to SCSO policy if not claimed. (*See id.*, Ex. 8.) The Government claims that
9 the SCSO did not treat Mr. Hendrix’s case as a criminal referral until “late September
10 2018” due to the severity of Mr. Hendrix’s injuries and the fact that he had not yet been
11 released from Harborview. (*See id.* at 3-4.) Ultimately, Deputy Dermott prepared the
12 case for criminal referral, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives
13 (“ATF”) eventually adopted the case for federal prosecution. (*See id.* at 4.) ATF Special
14 Agent Matthew Wear handled the case for the ATF. (*See id.*)

15 Mr. Hendrix was indicted on January 31, 2019. (*See* Dkt. # 1.) On March 6,
16 2019, Agent Wear collected the heroin, methamphetamine, firearm, magazines, and
17 ammunition that had been entered in SCSO evidence. (*See* Resp. at 4; *id.*, Ex. 10.)
18 Agent Wear also collected two sealed brown paper bags from safekeeping that were
19 marked as “Household Goods: Items/Property from Injured Motorcycle Rider,” but left
20 behind one sealed brown paper bag marked “Household Goods: Items/Property from
21 Injured [sic] Motorcycle Rider.” (*See id.* at 4; *id.*, Ex. 10.) The Government states that
22 the contents of the bag that Agent Wear left behind are unknown, and the Government

1 does not explain why Agent Wear took only two out of three bags. (*See id.* at 4.) On
2 May 12, 2019, the SCSO destroyed the remaining property in safekeeping without
3 informing the Government. (*See id.*) The Government does not have possession of the
4 fanny pack or the eight empty plastic baggies and no pictures were taken of the fanny
5 pack or its contents. (*See id.*)

6 **III. ANALYSIS**

7 Mr. Hendrix now alleges that counts 5-7 of the indictment—all of which relate to
8 the August 24, 2018 arrest—should be dismissed due to the Government’s destruction of
9 the fanny pack and empty baggies, which allegedly violates Mr. Hendrix’s right to due
10 process.² (*See Mot.* at 1-2.) Alternatively, Mr. Hendrix seeks to exclude testimony of the
11 SCSO officers who conducted the search of the fanny pack. (*See id.*) Finally, Mr.
12 Hendrix requests an adverse inference instruction stating that the jury may find that, if the
13 fanny pack and empty baggies had been preserved, it would be helpful to Mr. Hendrix.
14 (*See id.*) Mr. Hendrix requests an evidentiary hearing to resolve any contested factual
15 matters bearing on these issues. (*See id.*) In response, the Government claims that none
16 of these sanctions are warranted because Mr. Hendrix has not shown that the evidence at
17 issue would be exculpatory or that the Government acted in bad faith. (*See Resp.* at 1.)

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20 ² Mr. Hendrix also argues that the SCSO’s failure to take photographs of the fanny pack
21 and its contents violates due process. (*See Mot.* at 10-11.) The court rejects that argument out of
22 hand. The court is not aware of any authority suggesting that law enforcement violates due
process by failing to take all of the photographs that a defendant would prefer to have access to,
and Mr. Hendrix was unable to identify any such authority in its briefing or at oral argument.

1 The court first considers whether Mr. Hendrix is entitled to an evidentiary hearing
2 before moving to the merits of his motion.

3 **A. Request for an Evidentiary Hearing**

4 As a threshold matter, the court addresses Mr. Hendrix's request for an evidentiary
5 hearing. Generally, evidentiary hearings must be held "only when the moving papers
6 allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to
7 conclude that contested issues of fact exist." *United States v. Howell*, 231 F.3d 615, 620
8 (9th Cir. 2000). Mr. Hendrix has not met that burden here.

9 The relevant factual issues for this motion center on the missing fanny pack and
10 plastic baggies; specifically, why that evidence went missing, what its exculpatory value
11 could have been, and whether the SCSO or the Government acted in bad faith in
12 misplacing or destroying the evidence. The Government sets forth its explanation on
13 those issues and provides evidence in support of that explanation in its response to Mr.
14 Hendrix's motion. (*See generally* Resp. at 1-5.) The SCSO collected the fanny pack at
15 the scene of Mr. Hendrix's accident, inventoried the fanny pack and items within the
16 fanny pack at the precinct, and catalogued some of the items as "evidence" and others as
17 "household goods." (*See id.* at 2-3.) In March 2019, Agent Wear collected all of the
18 items marked as "evidence" and two out of three bags of "household goods." (*See id.* at
19 4.) After Agent Wear collected the evidence, the third bag of "household goods" was
20 destroyed pursuant to SCSO policies. (*See id.*) The Government has confirmed that the
21 fanny pack and empty baggies are now gone. (*See id.* at 4-5.)

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1 Mr. Hendrix, on the other hand, has not alleged any facts with “sufficient
2 definiteness, clarity, and specificity” that would enable the court to conclude that
3 meaningful contested issues of fact exist. (*See generally* Mot. at 4-7.) Indeed, when
4 asked at oral argument what factual disputes justified Mr. Hendrix’s request for an
5 evidentiary hearing, Mr. Hendrix responded that the defense was entitled to examine the
6 SCSO officers in order to test their credibility. (*See* 12/4/19 Hearing.) But Mr. Hendrix
7 offered no evidence or contrary testimony to suggest that the SCSO’s or the
8 Government’s account of the incident was not credible. (*See id.*) The court finds that,
9 absent facts or contrary testimony placing credibility at issue, Mr. Hendrix’s blanket
10 desire to test the credibility of law enforcement is little more than a fishing expedition.
11 That is not sufficient to create a contested issue of fact that warrants an evidentiary
12 hearing. *See Howell*, 231 F.3d at 621 (concluding that “boilerplate” and “conclusory”
13 motion was inadequate to warrant evidentiary hearing).

14 Because Mr. Hendrix has not shown that there are any contested issues of fact, the
15 court DENIES his request for an evidentiary hearing.

16 **B. Due Process Claim**

17 The Government’s failure to preserve evidence violates due process in two
18 scenarios: (1) when the unavailable evidence “possess[es] an exculpatory value that was
19 apparent before the evidence was destroyed, and [is] of such a nature that the defendant
20 would be unable to obtain comparable evidence by other reasonably available means,”
21 *California v. Trombetta*, 467 U.S. 479, 489 (1984); and (2) where the Government’s
22 failure to preserve “potentially useful” evidence—as opposed to exculpatory evidence—

1 was done in bad faith, *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). The court
2 considers these issues in turn.

3 1. Exculpatory Value

4 Under *Trombetta*, the key question is whether an item's exculpatory value is
5 apparent before it is lost or destroyed. *Trombetta*, 467 U.S. at 489. Evidence is
6 exculpatory if it is "favorable to an accused" and "material either to guilt or to
7 punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "Exculpatory evidence is
8 material if its introduction at trial would have resulted in a markedly weaker case for the
9 prosecution and a markedly stronger one for the defense." *See Comstock v. Humphries*,
10 786 F.3d 701, 711 (9th Cir. 2015) (citations omitted). Mere speculation regarding the
11 exculpatory value of evidence is not sufficient to establish that the evidence is
12 exculpatory. *See United States v. Drake*, 543 F.3d 1080, 1090 (9th Cir. 2008) ("The
13 exculpatory value of an item of evidence is not 'apparent' when the evidence merely
14 'could have' exculpated the defendant.").

15 Mr. Hendrix has made essentially no attempt to show that the lost fanny pack or
16 baggies had "exculpatory value," let alone that the SCSO knew it was exculpatory when
17 it destroyed the evidence. Mr. Hendrix's arguments on the exculpatory value of the lost
18 items focuses on their relevance to the Government's case. (*See, e.g.*, Mot. at 9-10 ("The
19 items also had an apparent exculpatory value because the government is claiming that
20 Hendrix, by virtue of the fanny pack, was in physical possession of the drugs, the
21 baggies, and the firearm. Physical possession is a critical element to all of the charges
22 arising under the August incident.")). The court agrees that the existence of the fanny

1 pack and empty baggies have at least marginal relevance to the charges filed against Mr.
2 Hendrix. According to the Government, the fanny pack was the container carrying the
3 narcotics and the firearm, while the empty baggies suggest that Mr. Hendrix was more
4 than just a recreational narcotics user. But that the lost or destroyed evidence is relevant
5 is not the question *Trombetta* and its progeny ask. Rather, the question is whether the
6 evidence had apparent exculpatory value, *see Trombetta*, 467 U.S. at 489, and the issue
7 with Mr. Hendrix’s motion is that he cannot explain how the empty fanny pack and
8 empty plastic baggies would do anything other than inculcate him. Outside of purely
9 conjectural challenges to the SCSO’s credibility, Mr. Hendrix does not meaningfully
10 dispute the existence of the fanny pack or empty baggies. (*See generally* Mot.) And Mr.
11 Hendrix did not articulate any hypothetical characteristics of the fanny pack or empty
12 baggies that would exculpate him if he could present those characteristics to the jury.
13 (*See generally id.*)

14 Because Mr. Hendrix cannot show that the fanny pack had exculpatory value, he
15 cannot establish a due process violation under *Trombetta* and its progeny. Instead, his
16 central argument that he is entitled to review the fanny pack and empty baggies due to
17 their relevance to his case is more appropriately viewed under the *Youngblood* framework
18 that the court considers below.

19 2. Potentially Useful Evidence

20 At best, Mr. Hendrix has established that the fanny pack and empty baggies were
21 “potentially useful” evidence under *Youngblood*. “Potentially useful” evidence is
22 “evidentiary material of which no more can be said than that it could have been subjected

1 to tests, the results of which might have exonerated the defendant.” *Youngblood*, 488
2 U.S. at 57 (1988). Where lost or destroyed evidence is only “potentially useful,” the
3 defendant alleging due process violations due to the loss of that evidence bears the
4 burden to show that law enforcement acted in bad faith in losing or destroying the
5 evidence. *See id.* (“We therefore hold that unless a criminal defendant can show bad
6 faith on the part of the police, failure to preserve potentially useful evidence does not
7 constitute a denial of due process of law.”).

8 Mr. Hendrix cannot meet this burden because there is no evidence that the SCSO
9 acted in bad faith in failing to preserve the fanny pack and empty baggies. To the
10 contrary, the available evidence shows that the SCSO acted in “good faith and in accord
11 with their normal practice.” *See Youngblood*, 488 U.S. at 56 (quoting *Trombetta*, 467
12 U.S. at 488). The SCSO collected the fanny pack at the scene, returned to the station, and
13 carefully inventoried Mr. Hendrix’s property. (*See Resp.* at 2-4.) During that process,
14 Deputy Dermott determined that the heroin, methamphetamine, Glock handgun,
15 magazines, and ammunition taken out of the fanny pack or off of Mr. Hendrix’s person
16 were evidence and stored them as such. (*See id.* at 3-4; *id.* Ex. 7.) He determined that the
17 remaining items were personal property and entered them into safekeeping. (*See Resp.* at
18 3-4; *id.* Ex. 7.) Mr. Hendrix was then notified that he had 60 days to collect his property
19 pursuant to SCSO policy. (*See Resp.*, Ex. 8.) The SCSO then kept all of Mr. Hendrix’s
20 property until Agent Wear had an opportunity to review and collect that property in
21 March 2019 and destroyed the “household goods” that Agent Wear did not collect two
22 months later. (*See id.* at 4; *id.*, Ex. 10.)

At most, the evidence suggests that Deputy Dermott made the wrong decision when he catalogued the fanny pack and its contents. Given the nature of the items found in the fanny pack, it would have been reasonable to suspect that Mr. Hendrix may be charged in the future with possession of narcotics with intent to distribute. In anticipation of those charges, Deputy Dermott could have catalogued the fanny pack and empty baggies as “evidence” instead of “household goods.” Alternatively, Deputy Dermott could have taken pictures of the fanny pack and its contents to ensure that there were additional sources of evidence available. Still, the problem with Mr. Hendrix’s due process argument is that there is no evidence that his decisions to preserve the drugs, ammunition, and firearms found inside the fanny pack and catalog everything else as personal property was made in bad faith. Bad faith, in this context, requires a showing of “official animus” or “a conscious effort to suppress exculpatory evidence.” *See Trombetta*, 467 U.S. at 488. At most, the SCSO’s decision not to catalog the fanny pack and empty baggies as “evidence” is evidence of a negligence, which is not enough to show bad faith. *See United States v. Flyer*, 633 F.3d 911, 916 (9th Cir. 2011) (“Bad faith requires more than mere negligence or recklessness.”); *United States v. Brown*, No. 2:17-CR-58 JCM (VCF), 2018 WL 451556, at *3 (D. Nev. Jan. 16, 2018) (“A showing of negligence or recklessness is insufficient—bad faith requires something akin to a “conscious effort to suppress exculpatory evidence.”); *United States v. Taylor*, 312 F. Supp. 3d 170, 179 (D.D.C. 2018) (“At most [the defendant] has shown that the investigation and documentation of what was found was incomplete. That may form a

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1 basis for cross-examination of the government’s witnesses, but it does not rise to the level
2 of a due process violation.”).

3 Thus, the court concludes that Mr. Hendrix has not met his burden to show that the
4 SCSO or the Government acted in bad faith. Accordingly, the court DENIES Mr.
5 Hendrix’s due process challenge and his request to dismiss counts 5, 6, and 7.

6 **C. Alternative Sanctions**

7 In the Ninth Circuit, “[t]he rule governing sanctions for lost or destroyed evidence
8 is found in the controlling concurrence in *United States v. Loud Hawk*.” *United States v.*
9 *Robertson*, 895 F.3d 1206, 1213 (9th Cir. 2018) (citing *United States v. Loud Hawk*, 628
10 F.2d 1139 (9th Cir. 1979) (en banc) (Kennedy, J., concurring), *reversed on other grounds*
11 *in United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008)). According to *Loud*
12 *Hawk*, a court’s “principal concern is to provide the accused an opportunity to produce
13 and examine all relevant evidence to insure a fair trial.” *Loud Hawk*, 628 F.2d at 1152.
14 In determining whether sanctions are necessary to protect the interests of the accused,
15 courts must balance “the quality of the Government’s conduct” against “the degree of
16 prejudice to the accused.” *Id.* In conducting that balancing test, the Government bears
17 the burden of justifying its conduct and the accused of demonstrating prejudice. *Id.*
18 Sanctions against the Government, including suppression of evidence, may be imposed
19 even in the absence of bad faith or a constitutional violation. *See United States v. Flyer*,
20 633 F.3d 911, 916 (9th Cir. 2011) (citing *Loud Hawk*, 628 F.2d at 1152).

21 Here, the court is somewhat troubled by the quality of the Government’s conduct.
22 In assessing the “quality” of the Government’s actions, courts “consider whether the

1 evidence was lost or destroyed while in the government's custody, whether the
2 government acted in disregard of the defendant's interests, whether the government was
3 negligent, whether the prosecuting attorneys were involved, and, if the acts were
4 deliberate, whether they were taken in good faith or with reasonable justification.”
5 *Robertson*, 895 F.3d at 1213 (citing *Loud Hawk*, 628 F.2d at 1152). As noted above, the
6 fanny pack and empty baggies are relevant to this case, *see supra* § III.B.1, and the
7 relevance of those items probably should have been clear to the SCSO, *see supra*
8 § III.B.2. Moreover, although the Government does not appear to know exactly what
9 happened to the fanny pack and empty baggies, there is no dispute that the SCSO had
10 possession of those items during inventory and that they are now gone. (*See Resp.* at 3;
11 *id.*, Ex. 3 at 3-4.) And the Government cannot point the finger entirely at the SCSO. Mr.
12 Hendrix was indicted on January 31, 2019, and no evidence from SCSO was destroyed
13 until May 12, 2019 (*see id.* at 4), leaving the Government with more than five months to
14 collect and preserve this evidence. Moreover, Agent Wear had an opportunity to collect
15 the evidence at the SCSO and chose to collect two out of three bags of “household
16 goods.” (*See id.*) Yet, the Government still did not retain the fanny pack or empty
17 baggies. Taken together, this evidence shows that the evidence was lost on the
18 Government's watch and that the SCSO and the Government were arguably negligent in
19 conducting their investigations.

20 That said, the remaining factors identified in *Robertson* weigh in the
21 Government's favor. The prosecuting attorneys responsible for this case do not appear to
22 have been involved in the loss of the evidence; there is no evidence that the Government

1 or the SCSO was acting in “disregard of” Mr. Hendrix’s interests; and, as noted above,
2 the loss of evidence was not deliberate and appears to have been a result of standard
3 SCSO practices for destroying personal property kept in safekeeping, *see supra* § III.B.2.
4 Thus, the analysis on the “quality” of the Government’s actions is relatively neutral.

5 With respect to “the degree of prejudice” to Mr. Hendrix, courts consider “the
6 centrality and importance of the lost evidence to the case, the probative value and
7 reliability of secondary or substitute evidence, the nature and probable weight of
8 inferences and kinds of proof lost to the accused, and the probable effect on the jury from
9 the absence of the evidence.” *Robertson*, 895 F.3d at 1214 (citing *Loud Hawk*, 628 F.2d
10 at 1152). The court has already touched on many of these factors. *See supra* § III.B.1.
11 As Mr. Hendrix notes, due to the absence of photographs, the only secondary evidence
12 available is the SCSO officers and their reports, which effectively positions the fox to
13 guard the hen house. That said, Mr. Hendrix has not been able to point to any evidence
14 to suggest that the SCSO’s accounts of the fanny pack and its contents are anything less
15 than truthful. *See supra* § III.A. As far as the character of the lost evidence, the court has
16 already noted that the empty fanny pack and empty baggies are relevant to this case but
17 not crucial or exculpatory. It is also not clear to the court what Mr. Hendrix would have
18 been able to prove had the fanny pack and empty baggies been available to him. In fact,
19 the loss of those items is likely more detrimental to the Government than Mr. Hendrix.
20 Ultimately, the court finds that Mr. Hendrix suffered a fairly low degree of prejudice, if
21 any, as a result of the lost evidence.

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1 Accordingly, given that the Government's conduct falls well short of egregious
2 and Mr. Hendrix has not been significantly prejudiced, the court will not exclude the
3 testimony of the officers who searched the fanny pack. Instead, the court believes that
4 the appropriate remedy under the circumstances is to allow the parties to present this
5 evidence to the jury and allow the jury to conclude what weight, if any, to give to the fact
6 that the Government or the SCSO lost the fanny pack and the empty baggies. In order to
7 assist the jury in making that determination, the court finds that a jury instruction
8 modeled after Ninth Circuit Model Criminal Jury Instruction 4.19 is warranted:

9 **4.19 LOST OR DESTROYED EVIDENCE**

10 If you find that the government intentionally [destroyed][failed to preserve]
11 [insert description of evidence] that the government knew or should have
12 known would be evidence in this case, you may infer, but are not required to
13 infer, that this evidence was unfavorable to the government.

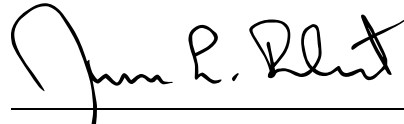
14 Thus, the court GRANTS in part and DENIES in part Mr. Hendrix's request for
15 sanctions. The court will not exclude any evidence as a result of the loss of the fanny
16 pack and the empty baggies, but the court will provide a jury instruction on the lost
17 evidence.

18 **IV. CONCLUSION**

19 For the reasons set forth above, Mr. Hendrix's motion to dismiss counts 5, 6, and 7
20 and, in the alternative, to exclude evidence and provide jury a instruction for failure to
21 preserve evidence (Dkt. # 88.) is GRANTED in part and DENIED in part. Mr. Hendrix's
22 requests to dismiss counts 5, 6, and 7 and to exclude evidence are DENIED, but his
request for a jury instruction for failure to preserve evidence is GRANTED. The court

1 further ORDERS the parties to file proposed joint or disputed instructions modeled after
2 Ninth Circuit Model Criminal Jury Instruction 4.19 for the court's review by Tuesday,
3 December 10, 2019.

4 Dated this 6th day of December, 2019.

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7 JAMES L. ROBART
8 United States District Judge
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